RECORD
AND
BRIEF

No. 16-300

IN THE

Supreme Court of the United States

ERNST & YOUNG, LLP, ET AL.,
Petitioners,

v.

STEPHEN MORRIS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE SUPPORTING PETITIONERS

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October 11, 2016

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INTEREST OF THE *AMICUS CURIAE*[1]

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies that together have $6 trillion in annual revenues and nearly 15 million employees. The BRT's member companies comprise nearly one-quarter of the total value of the U.S. stock market and pay $226 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and participate in litigation as *amici curiae* where important business interests are at stake.

This case presents the question whether the National Labor Relations Act (NLRA) invalidates employment agreements that require employee-employer disputes to be resolved through individual arbitration, not collective adjudication such as a class action. Many of the BRT's members have integrated similar arbitration provisions as part and parcel of their own employment contracts. A ruling that renders class-action waivers unenforceable, like the Ninth Circuit's determination below, jeopardizes the reliance that many of the BRT's members have placed on having a speedy, efficient, and cost-effective means of resolving disputes with their employees.

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[1] All parties have consented to the filing of this brief. Blanket consents by petitioners and respondents are on file with the Clerk. The BRT provided notice of its intent to file this brief on October 4, 2016. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

A. The Ninth Circuit held here, and the Seventh Circuit has held in another case, that bilateral arbitration agreements between employers and employees are rendered unenforceable by the NLRA. Those holdings have caused great uncertainty for employers across the country. Many employers operating on a nationwide scale depend on the knowledge that claims brought by their employees will be resolved speedily, efficiently, and cost-effectively through the arbitration process, no matter what jurisdiction they are in. And other circuits had previously upheld these agreements as enforceable. But the circuit split has jeopardized that uniformity and has incentivized forum-shopping, with the Seventh and Ninth Circuits now serving as attractive venues for class plaintiffs. This case dramatizes the dilemma for nationwide employers: the same agreement, used by petitioners throughout the country, has been upheld in one circuit and struck down in another. Before the split deepens any further, this Court should answer the question of enforceability.

B. This case presents the best vehicle to consider the question presented. A motion to compel arbitration in a civil action between employer and employee narrows the issue to the sole question of enforceability. Because this petition arises out of such a motion, it presents the question of enforceability in a neat and easily resolvable manner that may wholly dispose of the case.

The Deputy Solicitor General, representing the National Labor Relations Board (Board), has asked this Court to take up the same question in a certiorari

petition seeking review of a Fifth Circuit decision that in turn reviewed a Board decision. *See NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016). But decisions in that posture are an inferior vehicle because they do not address a concrete dispute over the enforceability of a particular arbitration provision in a particular litigation. Rather, it turns on whether the *existence* of the agreement (or the mere attempt to enforce it in court) is an unfair labor practice under section 7 of the NLRA, 29 U.S.C. § 157. While the question of enforceability may be wrapped up to that analysis, *Murphy Oil* does not as neatly present it.

This Court should answer the question of enforceability in the context in which it is the most relevant—a civil action between employees and their employer that is subject to a bilateral arbitration provision. This case presents the rare circumstance where courts of appeals have weighed in *on the same arbitration agreement* and have rendered conflicting opinions. It is therefore the best vehicle for resolving the question whether the NLRA affects otherwise valid arbitration agreements that waive waiver of the right to pursue class and collective actions.

ARGUMENT

The Federal Arbitration Act makes agreements to arbitrate enforceable and adopts "a liberal federal policy favoring arbitration agreements." 9 U.S.C. § 2; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). That rule extends to agreements to arbitrate *individually*, not collectively. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 348 (2011). The question presented in this case is whether Congress, in the NLRA, made *employer-employee* agreements that mandate individual arbitration unenforceable—or empow-

ered the Board to do that. That question implicates an important and irreconcilable circuit conflict, and this is the case in which to resolve it.

A. Arbitration provisions and class-or-collective-action waivers play a key role in employment agreements, and employers require certainty as to whether and when such provisions are enforceable.

Employers, including many BRT members, have invested heavily in developing efficient methods of resolving employer-employee disputes. Relying on this Court's decisions that agreements to arbitrate are enforceable, many employers have turned to bilateral arbitration agreements as an optimal solution. But a circuit conflict now threatens to render that investment worthless, especially for nationwide employers: if even a handful of circuits refuse to enforce arbitration agreements because they provide for *bilateral* arbitration, then plaintiffs bringing nationwide class actions against nationwide employers will simply sue in those circuits.

Arbitration is often faster, more efficient, and cheaper than litigation in court: "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." (citations omitted. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); *see also* Ryan P. Steen, Comment, *Paying for Employment Dispute Resolution: Dilemmas Confronting Arbitration Cost Allocation*

Throw the Arbitration Machine Into Low Gear, 7 J. Small & Emerging Bus. L. 181, 182 (2003) ("The relative economic certainty of arbitration as opposed to litigation makes arbitration an attractive option for employers in a society where employment litigation is dramatically on the rise."). But much of that benefit is lost if the arbitration is not restricted to *bilateral* arbitration. "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility*, 563 U.S. at 348. As a result, the use of bilateral arbitration has become widespread among employers. And until this year, the circuits broadly held those agreements enforceable. *Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016); *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *see also Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-36 (11th Cir. 2014) (affirming a grant of a motion to compel arbitration and holding that the Fair Labor Standards Act "does not provide for a non-waivable, substantive right to bring a collective action" that defeats a waiver of collective action).

But now, in two significant circuits, an employer can no longer enforce those bilateral arbitration agreements. *See* Pet. App. 1a; *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016). That circuit conflict upsets the settled expectations of every employer doing business in the minority circuits.

This case is illustrative. The *same agreement* has been upheld as enforceable in the Second Circuit. *Sutherland*, 726 F.3d at 295-99. This case was brought in the Second Circuit but transferred to the Ninth Circuit—and as a result of the transfer, the employer can no longer enforce the arbitration agreement as written. Venue made all the difference. Yet nationwide employers count on arbitration provisions to provide predictable, speedy dispute resolution *wherever* disputes arise.

This Court should grant review to provide the certainty employers need. Are these agreements enforceable, or must employers go back to the drawing board? The Court should provide an answer, rather than watch more and more employment litigation gravitate to the circuits on the minority cite of the split. And as discussed below, this case furnishes the best vehicle to answer the question that matters.

B. The circuit conflict concerns whether an arbitration agreement mandating bilateral arbitration is enforceable, and this Court should answer that question in a case involving an attempt to enforce such an agreement.

Bilateral arbitration provisions in employment contracts have been attacked both in court, in disputes that invoke the arbitration agreement, and in proceedings before the Board. Cases like this one—cases that involve the grant or denial of a motion to compel arbitration of a particular dispute under the FAA—are the appropriate vehicles to decide whether an arbitration agreement like this one is excepted from the FAA's rule of enforceability. The Board has brought a number of

proceedings contending that employers violate the NLRA merely by maintaining such an arbitration provision, *or* by seeking to enforce one in court. But the issue on which there is a conflict concerns the interpretation of the FAA, *not* just the NLRA, and Board proceedings involve collateral issues that could impede resolution of the split. This Court should therefore take an FAA case to answer the FAA question.

A motion to compel arbitration in a private action neatly presents a single question: whether an arbitration clause is enforceable as written. In this case, the district court held that it was; the Ninth Circuit panel majority held that it was not. The petition here therefore neatly presents the question whether an agreement like petitioners' is "valid, irrevocable, and enforceable," or whether it is instead rendered unenforceable on some "grounds [that] exist . . . for the revocation of any contract." 9 U.S.C. § 2.

When an arbitration clause containing a class-or-collective-action waiver is contested in an adjudication before the Board, however, the inquiry becomes more muddled and complicated. Unlike a court, the Board does not consider whether the employer *actually invoked* the clause with regard to a particular employee's claims, or whether that clause may be enforced at all. *See Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014) (under Board precedent, "the employer's enforcement of the rule" is not determinative as to whether there has been a section 7 violation—the rule need only "reasonably tend to chill employees in the exercise of their Section 7 rights" (citations and internal quotation marks omitted)). Nor does the Board even care whether the agreement is entered into volun-

tarily. *See On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, 2015 WL 5113231, at *9 (Aug. 27, 2015), *enforcement denied mem.*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

Rather, the Board asks whether the implementation and enforcement of that clause constitutes an unfair labor practice. This means the Board must consider, sometimes in the abstract, whether the clause's inclusion in the employment agreement interferes with an employee's right to engage in concerted activity, whether an attempt to enforce the clause in court is a *separate* violation of the NLRA, and whether holding the employer liable for attempting to enforce the clause in court is in line with the limitations that the First Amendment places on the Board. *See, e.g., Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1020-21 (5th Cir. 2015).

Because of the procedural simplicity of a motion to compel arbitration, it is no surprise that the majority of circuits to have addressed the question presented have done so against the backdrop of a civil action between private parties. The two courts to hold that the NLRA forbids enforcement of an arbitration agreement containing a waiver of class or collective action, the Seventh and Ninth Circuits, have done so in reviewing district court decisions on motions to compel arbitration. *See* Pet. App. 1a; *Lewis*, 823 F.3d at 1153 (review of denied motion to compel arbitration). And most of the courts rightly holding that such agreements are permissible also have done so on review of district court decisions on motions to compel arbitration. *See Patterson*, 2016 WL 4598542, at *2 (grant of a motion to compel arbitration); *Sutherland*, 726 F.3d at 295-99;

Owen v. Bristol Care, Inc., 702 F.3d at 1055; *see also Walthour*, 745 F.3d at 1334-35.

In contrast, when the enforceability issue is raised in the Board's adjudicative proceedings, it is often entangled in a web of other issues. The Deputy Solicitor General's preferred vehicle, the Fifth Circuit's recent decision in *Murphy Oil*, illustrates the problem. There, the court focused most of its attention on a collateral issue—whether the Board erred in finding that the employer's past *attempts to enforce* the agreement by filing motions to compel arbitration were in themselves violations of the NLRA. *See* 808 F.3d at 1020. To answer that question, the Fifth Circuit turned to this Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), in which this Court held that a lawsuit against an employee is actionable as an unfair labor practice only when that lawsuit is a "baseless" one, "with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA." *Id.* at 744. The Fifth Circuit held in *Murphy Oil* that the employer's past attempts to compel arbitration were not "baseless" because there was no evidence of retaliation, because the employer's position was ultimately correct in light of the circuit's caselaw, and because the Board had yet to speak "on the lawfulness of such agreements in light of the [Act]" when the employer had filed its motions to compel arbitration. 808 F.3d at 1021.[2]

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[2] The Eighth Circuit held similarly in *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (2016). Adopting the rationale of *Murphy Oil*, it held that the class-action waiver at issue in that case "did not violate section 8(a)(1)," and thus the employer's at-

The Board has asked this Court to review the decision in *Murphy Oil*. *See* Pet. for a Writ of Cert., *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016), but its certiorari petition does not address the aspects of the Fifth Circuit's decision that consumed most of the ink—how to balance "an employer's First Amendment right to litigate and an employee's Section 7 right to engage in concerted activity." 808 F.3d at 1020. In addressing the employer's attempted *enforcement* of the agreement, the court was required to address whether the employer's actions in moving to compel arbitration was indeed "baseless," *Bill Johnson's*, 461 U.S. at 745, both objectively and subjectively. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 531-32 (2002). The Fifth Circuit only briefly addressed whether the agreement itself was enforceable, and then only in the context of the Board's allegation that *maintaining* the agreement was an unfair labor practice, whether or not it was ever enforced.

There are, in short, some differences between the questions whether a bilateral arbitration agreement is *enforceable* and whether it is *an unfair labor practice*. Clarifying that an agreement like petitioners' *is* enforceable should resolve both sets of cases, whereas it is possible that deciding an unfair-labor-practice case might not.

Moreover, agency deference is no reason to favor an adjudication by the Board as a vehicle. The Board deserves *no* deference when it comes to the Federal Arbi-

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tempt to "enforce the class-action waiver likewise did not violate section 8(a)(1)."). *Id.* at 776-77.

tration Act.[3] *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have . . . never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel."); *Richards v. Ernst & Young LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) ("[W]e also note that the two court of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in *D.R. Horton* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act."); *see also* Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown Over the Right to Collective Action in Workplace Disputes*, 52 Am. Bus. L.J. 75, 128 (2015) ("Courts that have considered the Board's decision have paid lip service to the requirement that its interpretation of section 7 requires *Chevron* deference. Nevertheless, they have found that the Board's interpretation of the FAA has little import because the Board has no expertise in interpreting the

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[3] The Board has attempted to hint otherwise in at least one other case. *See* Br. for the NLRB at *22 n.5, *Cowabunga, Inc. v. NLRB*, Nos. 16-10932, 16-11391, 2016 WL 4268061 (11th Cir. filed Aug. 8, 2016) (advancing the position that even in "the FAA context," the Board's determination is "within *Chevron*'s scope" (citation omitted)).

FAA or Supreme Court decisions that construe the FAA.").

It is indeed telling that *none* of the courts of appeals to side with the Board's position have adopted or deferred to the Board's rationale in *D.R. Horton*. In the Ninth Circuit's discussion of the interplay between the FAA and the NLRA in this case, for instance, the court of appeals undertook an independent analysis of both statutes and found its ultimate conclusion "consistent with the Board's interpretation," Pet. App. 6a, but did not defer to a decision of the Board. *See id.* at 34a (Ikuta, J., dissenting) ("Although the majority cites [*Chevron*], it does not defer to the NLRB's interpretation of § 7 as overriding the command of the FAA in [the NLRB's decision in *D.R. Horton*], which was subsequently overruled by the Fifth Circuit. Rather, the majority states that 'the NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron*.'"). The Seventh Circuit took a similar tack in *Lewis*. While it alluded briefly to the concept of deference by noting that "[t]he Board's interpretations of ambiguous provisions of the NLRA are 'entitled to judicial deference,'" it held that section 7 was *not ambiguous* and thus no agency deference was necessary. 823 F.3d at 1153.

None of the Board decisions percolating in the federal courts of appeals is likely to present the enforceability question any more neatly than the petition here. They, too, are encumbered by ancillary issues attached to the question of enforceability. For example, *AT&T Mobility Servs., LLC v. NLRB*, which is currently before the Fourth Circuit, presents the additional question whether an arbitration agreement with an opt-out

option still implicates the same purported section 7 concerns. *See* Pet'r Br. at 43-53, *AT&T Mobility Servs., LLC v. NLRB*, Nos. 16-1099 and 16-1159 (4th Cir. filed Apr. 4, 2016). And the D.C. Circuit will soon consider *Price-Simms v. NLRB*, which presents the same question that the Fifth Circuit considered in *Murphy Oil* and the Eighth Circuit addressed briefly in *Cellular Sales*—whether a motion to compel arbitration constitutes a "baseless" litigation under *Bill Johnson's* and *BE&K Construction*. *See* Pet'r Br. at 21-25, *Price-Simms v. NLRB*, Nos. 15-1457, 16-1010 (D.C. Cir. filed Apr. 6, 2016).

* * * * *

This petition neatly presents a single question: whether an agreement to individually arbitrate claims between an employer and an employee is enforceable, or whether the NLRA (which is silent on the question of arbitration) demands a different result. Pet. i. The petition presents that question in the context of a private employer-employee dispute over the enforceability of that agreement. And the petition presents the rare circumstance where two courts of appeals have interpreted the *same* arbitration agreement and have made divergent determinations as to whether that agreement should be enforced. That a conflict exists as to the lawfulness of a *single agreement* makes this case an especially attractive vehicle for addressing the enforceability issue.

CONCLUSION

The petition for a writ of certiorari in this case should be granted, and the other cases (including *NLRB v. Murphy Oil*) presenting the same issue should be held pending consideration of this case on the merits.

Respectfully submitted.

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October 11, 2016